No. 14596

In the
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Northern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of one year and one day. [R 9-11]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 11]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. [R 3-4] It was alleged that he became a registrant of Local Board No. 11 of the Selective Service System in the City of Oroville, County of Butte, State of California and that having theretofore been duly classified in Class I-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 11 to report to his said Local Board No. 11 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto. [R 4]

Appellant pleaded not guilty, waived jury trial and was tried on September 8th, 1954. [R 12-] A written motion for judgment of acquittal was filed. [R 5-] The motion was denied and the appellant was found guilty on October 4th and sentenced on October 12th. [R 8-9] The motion contains all of the grounds that the appellant relies upon for reversal of the judgment in this case. [R 58-]

THE FACTS

Appellant registered with Local Board No. 11 on August 3, 1949 [Ex 1-2]* He filed his 8-page Classification Questionnaire on July 6, 1949. [Ex 5-] In it he showed he was a minister of religion [Ex 7, Series V, 1(a)]; that he regularly served as a minister; that he had been a minister since September 19, 1942, having been ordained on that date; that he was still studying in the Theocratic Ministry school of The Watch Tower Bible and Tract Society. [Ex 7] He showed his secular work was fulltime, he being an apprentice mason. [Ex 8] He did not sign Servies XIV (conscientious objector declaration) [Ex 11] but after he was classified I-A on August 7, 1950 he made a written request for the Special Form for Conscientious Objectors on August 27, 1950 explicitly basing his professions of conscientious objections on his ministry. [Ex 16] He filed the completed Special Form [Ex 19-] and the local board reclassified him into Class IV-E on September 18, 1950. At that time (and until the fall of 1951) IV-E was the class for conscientious objectors who had religious scruples against any type of participation in military activity. Until the terminology was changed to I-O, by regulation dated 28 September 1951, no duties were attached to Class IV-E registrants and appellant was as free to follow his ministry as if he had been given the IV-D (minister's) classification.

*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

In the fall of 1951 the local boards were sent the new regulations. On November 16, 1951 appellant's local board reclassified him in Class I-A altho no evidence of any nature, new or otherwise, was placed in his file. [Ex 12]

Appellant promptly asked for a personal appearance and an appeal, under date of November 19, 1951. [Ex 23] In this letter he stated he would submit new evidence. This he did on December 10, 1951 the date of his Appearance Before Local Board. [Ex 24, 27-31, 32-33] He showed he was acting as a minister, and was considered as one by his fellows. He did this by his testimony, by a letter from one of his church leaders and by a certification signed by 30 persons. His claim and evidence for a minister's classification (as well as for a conscientious objector's) was again rejected, apparently because he had not "attended or graduated from a recognized Theological Seminary or Bible Institute" . . . "He only attended High School." [Ex 26, the local board's summary of the hearing]

Thereupon appellant again requested an administrative appeal [Ex 34]. On January 10, 1952 the Appeal Board reclassified him in Class I-O. [Ex 36] The decision being unanimous he had no further appellate recourse. [32 C. F. R. §1627.3]

Thereafter, the local board requested appellant to designate three types of civilian work he would be willing to do as a Class I-O registrant. [Ex 66] He gave stone masonry as his first choice, the secular work of

his church's non-profit corporation as his second choice and truck driving as his third choice [Ex 67]. He was offered none of these [Ex 70] and on November 5, 1952 withdrew his offer for the stated reason that he had concluded any of such work would interfere with his ministry. [Ex 75]

On February 21, 1953 the board offered him 3 types of work. [Ex 76] He replied, reminding them he had on file an apprentice training deferment claim [Ex 73] not yet determined. The board replied in such a manner that appellant was deprived of an opportunity to have an administrative appeal. [Ex 79]

After more negotiations between the board and appellant he again pointed out that his vocation was the ministry and that he could not compromise it.[Ex 97]

On October 22, 1953 he presented new and further evidence of his ministry, namely that he had been elevated to the position of Area Study Conductor. This included instruction of a class of 40 persons. [Ex 102-13]. He gave other details of his work, and in corroboration of his personal evidence submitted an affidavit of the presiding minister of the congregation of ministers to which he belonged. [Ex 104] This new evidence was rejected in a manner that precluded appellant from seeking an administrative review of the local board's determination. [Ex 108] Part of the board's error was noted by a selective service supervisory officer [Ex 122] and the clerk thereafter sent appellant a notification which informed him of the rejection of his evidence but the notification did not inform him or

give him, the opportunity for an appellate determination. [Ex 123]

Subsequently, appellant was sent an Order to Report for Civilian Work. [Ex 109-] He again wrote the board this would be a compromise with his ministry. [Ex 118]

Appellant was sent another Order on February 15, 1954 [Ex 127] and he again wrote the board he could not compromise his ministry; in this letter he also gave new and further evidence of his ministry, namely, that he now held the position of Assistant Presiding Minister. This evidence was corroborated by the Presiding Minister. [Ex 133] His new evidence was disregarded; there was no rebutting evidence to it or, in fact, to any of his evidence. After appellant's last submission of evidence the board took the position it was without authority to reopen his classification because of the order to report for civilian work.

QUESTIONS PRESENTED AND HOW RAISED

I.

Concerning appellant's ministry: the undisputed evidence was that appellant, from the very first, claimed he was a minister of the gospel and produced evidence that he regularly acted as one, and that he was regarded as a minister by his associates.

When the local board rejected all his claims (including religious conscientious objection to war) and gave him a I-A classification he appealed administratively; the Appeal Board found him to be truthful and credited all his claims that he was a sincere and complete-type (I-O) religious conscientious objector. It ignored his claim to a minister's classification altho his evidence was undisputed.

The question presented here is whether the denial of his claim for a minister's classification was arbitrary. Also involved here is whether artificial standards [no college or theological seminary] were used for judging his claim.

The questions were raised by motion for judgment of acquittal. [R 5-8] All the following questions were raised in the same manner.

II.

Concerning appellant's constitutional and related attacks on the work order: They are whether or not the Act and/or the regulations comply with the follow-

ing amendments to the constitution: 1st, 5th, 13th and 14th and whether or not the work to which appellant was ordered, the Los Angeles County Department of Charities, is a type of work that is as required by the Act.

III.

Concerning procedural denials of due process:

1. Appellant claimed he did not have a fair hearing before his local board on December 10, 1951 in that the undisputed evidence was that he was limited in time to 5 minutes and was otherwise prevented from fully presenting his case for a minister's classification. [Ex 26; R 35-]
2. Appellant's new and further evidence undisputedly was disregarded, although unrebutted and of a determinative character, and his classification was not reopened. [Ex 102-105]

The questions presented are whether appellant was denied a fair and full hearing on December 10, 1951 and whether he was illegally denied a reopening on October 22, 1953.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

SUMMARY OF ARGUMENT

I.

Appellant presented substantial evidence to support his claim that he was both a regular and an ordained minister of a recognized sect, one that did not compensate its ministers; that he was considered a minister by numerous persons; that he regularly gave substantial amounts of time to this work; that it was his vocation and his secular activities were only to support his family.

None of his evidence was rebutted and he was rated truthful. Consequently, he should have received the minister's (IV-D) classification:

Dickinson vs. United States, 74 S. Ct. 152.

The basis used for denying his claim (that he had no college or theological school training) is no longer a legal basis:

Franks vs. United States, 216 F. 2d 266;
Clark vs. United States, 217 F. 2d 511 and other cases cited in Argument I.

II.

The conscientious objector work program to which appellant was ordered suffers from constitutional and related infirmities:

A. The work is not national or federal work, as required by the Act. Regardless of whether the national interest is served by work that is done for a local governmental unit, Congress intended, and expressly stated, that the work was to be national.

B. Only where the services are exceptional or not related to the national defense may labor be drafted without violence to the Thirteenth Amendment. Work for the Los Angeles Department of Charities falls in neither of these classes.

C. Appellant did not volunteer; he was ordered to do work he did not desire to do. Since the compulsory work is neither national, nor exceptional nor pertaining to defense, appellant has been denied due process of law under the Fifth Amendment.

D. Appellant was given the I-O conscientious objector classification solely because his evidence convinced the Selective Service System he was sincerely doing religious work: his ministry. His

ministry requires his availability to his calling. The order to work at a foreign place for twenty-four consecutive months is contrary to the religious freedom guarantees of the First Amendment.

III.

Selective service registrants are entitled to fair hearings before their local boards. A hearing that is deliberately limited to five minutes, and of which two minutes is consumed by board members, is unfair when the registrant has an unusually heavy burden of proof and has prepared fifteen minutes of relevant material for presentation.

Selective service registrants, whose status materially changes, are entitled as a matter of right to a reopening of their classification, upon presentation of written evidence showing facts, which, if true, justify a reclassification. Even if the local board is unconvinced, it should so handle the situation [reopen] so that the registrant has an opportunity for an appellate determination.

Appellant was denied due process in both of the above instances.

ARGUMENT

I.

THE DENIAL OF THE MINISTER'S CLASSIFICATION WAS ARBITRARY AND WITHOUT BASIS IN FACT.

The undisputed facts are that appellant was a minister of a recognized religious group; that this was his vocation; that his secular work was only to support himself and wife.

As early as 1949, in his first statement to the Selective Service System, appellant showed that he regularly served as a minister. [Ex 7] In fact, he showed that he had been considered, and had acted, as a minister since 1942. The selective service law does not bar minors from being ministers. See §1622.43, Appendix B. On the contrary, the promulgation of Regulation §1622.43, to govern registrants 18 years and up is an acknowledgment of a well known fact, namely, that many sects encourage youths to assume ministerial work.

Nor does the law require ministers, whether regular or ordained, to be "full-time" ministers. The standard is "vocation." Any other standard is an illegal importation.

Appellant was classified in Class IV-E in 1950. At that time such a conscientious objector classification carried no commitment that interfered with his ministry and was therefore the equivalent of a minister's

classification to him. The law was changed in 1951 and the new conscientious objector classification, I-O, carried a commitment of 24 months at work assigned to the registrant by his local board. Concurrent with the change of the law, the local board reclassified appellant in Class I-A. He promptly presented supportive and corroborative evidence of his ministerial status. This evidence was never rebutted. This evidence showed unmistakably the following: he was acting as a minister, and his superiors in his band of nearly 93 ministers, and his fellow-ministers, considered him a minister [Ex 24, 27-31, 32-33]. A legal reason must be found in the selective service file to support the rejection of his unrebutted evidence. A reason is present and apparent but it is not a legal one. The summary (prepared by the board) of the Appearance Before Local Board of appellant [Ex 26] shows that the board apparently rejected his claim because he had not "attended or graduated from a recognized Theological Seminary or Bible Institute." Neither the Act nor the regulations imposes such a requirement. Many decisions have held that the use of illegal standards invalidates the classification; see

Annett vs. United States, (10 Cir. 6/26/53) 205 F. 2d 689; *United States vs. Blevins,* (9 Cir. 11/26/54) 217 F. 2d 506; *Clark vs. United States,* (9 Cir. 12/3/54) 217 F. 2d 511; *Franks vs. United States,* (9 Cir. 10/4/54) 216 F. 2d 266; *Goetz vs. United States,* (9 Cir. 10/14/54) 216 F. 2d 270; *Hagaman vs. United States,* (3 Cir. 5/13/54) 213 F. 2d 86; *United States vs. Hertzog,* (M.D.

Penn. 6/23/54) 122 F. Supp. 632; *United States vs. Hinkle,* (9 Cir. 9/24/54) 216 F. 2d 8; *Schuman vs. United States,* (9 Cir. 12/21/53) 208 F. 2d 801, and *Taffs vs. United States,* (8 Cir. 12/8/53) 208 F. 2d 329.

A case squarely in point is *United States vs. Kezmes,* W. D. Penn. 125 F. Supp. 300. There, like here, the local board believed their Jehovah witness registrant ineligible for a minister's classification because he had no college or theological school training. [302] On the authority of *Dickinson vs. United States,* 74 S. Ct. 152, Kezmes was found not guilty.

It cannot be said the Selective Service System disbelieved appellant, for it gave him the conscientious objector's classification of I-O. If he lied on one claim he could not be believed on the other; true, his claim could have been rejected on the basis that his status or activity did not meet the standards set up by the law; but it couldn't be rejected on the basis of the educational qualification used by the local board or on the basis of mere suspicion or speculation that his ministerial activity did not meet the standard imposed by the law. The latter clearly are condemned by *Dickinson* supra. There must be some contradiction before there can be a rejection. That is the plain rule of *Dickinson.* The Selective Service System cannot ignore a *prima facie* case.

Although appellant makes his living by secular work, his testimony leaves no doubt that he devoted as much time to his ministry as do many of the clergy of the other 399 sects in the United States and that it

was his vocation in his eyes and in the eyes of his associates. [R 35-55]

II.

THE SELECTIVE SERVICE WORK PROGRAM TO WHICH APPELLANT WAS ORDERED SUFFERS FROM CONSTITUTIONAL AND RELATED INFIRMITIES.

A. The Order of the Local Board for Defendant to Perform Civilian Work at the Los Angeles County Department of Charities and Sections 1660.1 and 1660.20 of the Selective Service Regulations are in Conflict with the Act, Because the Work is Not National or Federal Work as Required by the Universal Military Training and Service Act.*

Section 1660.1 of the Selective Service Regulations reads as follows:

> "1660.1 Definition of Appropriate Civilian Work. (a) The types of employment which may be considered under the provisions of Section 6 (j) of Title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

*Defendant is indebted to the General Counsel of the Jehovah's witnesses for the argument herein set forth in A, B and C.

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of public health or welfare, including educational and scientific activities in support thereof when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

"(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 456 (j) of the Universal Military Training and Service Act (50 U. S. C. App. §456(j). 65 Stat. 83, approved June 19, 1951) provides:

" . . . (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or

interest as the local board may deem appropriate . . . ''

The key word here is ''national,'' as distinguished from state, city or county.

The word ''national'' has a very important and definite connotation in federal jurisprudence. A reading of the index to the United States Code Annotated shows page after page with references to laws relating to national organizations and laws. There are ''national'' parks as distinguished from ''state'' park, ''national'' banks as distinguished from ''state'' banks, ''national'' and ''state'' labor, relation boards, ''national'' and ''state'' housing administrations. These all show that the word ''national'' has a distinctive federal meaning. . . . See WORDS and Phrases, Volume 28, at pages 21-25.

The word ''national'' is defined in Volume 65 of Corpus Juris Secundum, at pages 38-39. There it is stated that the word ''national'' is an adjective, which means ''pertaining or relating to a nation as a whole; commonly applied in American law to institutions, laws or affairs of the United States or its government, as opposed to those of the several states.'' 65 C. J. S. 38-39.

Bouvier's Law Dictionary, Baldwin's Century Edition (Cleveland, Banks-Baldwin Law Publishing Company, 1940), defines ''national'' thus: ''Belonging to, affecting, or pertaining to, a particular nation: as, national domicile, the national government. Often op-

posed to State, and nearly synonymous with Federal; as, in national bank (q.v.), or national banking association."

Webster's New International Dictionary, Second Edition (G. & C. Merriam Co., 1950), at page 1629, defines "national". It says: "Of or pertaining to a (or the) nation; common to a (or the) whole nation; . . . Of or pertaining to a politically united people or state (a nation in sense (4)) . . . as, national debt."

Under "Crimes," 18 U. S. C. A., Section 709, at page 75, it appears that the use of the word "national" is prohibited for all except the federal government. It is a crime to use the word "national" as part of the business or firm, etc., except as permitted by the laws of the United States. In the 1954 Pocket Parts of 18 U. S. C. A., Section 709, the section is extended to National Housing or Public Housing Administration. The punishment is $1,000.00 fine, imprisonment for not more than one year, or both. Violation may also be enjoined at suit of the United States Attorney.

The annotation shows that the First National Corporation of Boston, a Massachusetts corporation with brokerage powers, it is not entitled, by reason of the inhibitions of former Section 583 of Title 12, to use the word "national" in its title (See 32 Op. Att'y Gen. 473 (1921). *Byers v. United States,* C. A. Kansas 1949, 175 F. 2d 654, cert. denied 70 S. Ct. 183, 338 U. S. 887, 94 L. Ed. 545, holds that the courts will take judicial notice of the fact that a bank with the word "national"

in its title is one organized pursuant to the laws of the United States.

The word "national" cannot be used as part of the name of any bank unless the bank is chartered under the laws of the United States and courts take judicial notice of such fact. See *Wedding v. First National Bank,* 133 S. W. 2d 931, 280 Ky. 610 (1939); *First National Bank v. First State Bank,* Tex. Com. App. 1927, 291 S. W. 206.

In the case where a registrant is ordered to work for the state or a state hospital, this is not a national or federal institution. It is, on the contrary, a state institution and not "national" or "federal" work. The work does not pertain to the "national" interest or welfare. It relates exclusively to "local" or 'state" welfare. The work's not being in the "national" interest consequently is not that which Congress intended or could constitutionally order to be performed by conscientious objectors.

A reasonable interpretation of the statute by the Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicated thereunder. (*Harrison v. Vose,* 50 U. S. 372, 378.) It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress intended to avoid results of such a character. (*United States v. Kirby,* 7 Wall. 482, 486-487; *United States v. American Trucking Ass'n,* 310 U. S. 534.) Where a statute is susceptible of two

constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States v. Delaware & Hudson Co.,* 213 U. S. 366, 408.) The argument of the Government requires the court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts as to such interpretation." (*Harriman v. Interstate Commerce Comm'n,* 211 U. S. 407, 422.)

If the statute is not interpreted in such a way as to afford the appellant the right to raise this point then grave doubts arise as to the constitutionality of the prescribed forced labor procedure. To avoid such consequences, the interpretation here suggested should be accepted.

The final order to perform the work at the Los Angeles County Department of Charities and Sections 1660.1 and 1660.20 of the Selective Service Regulations, authorizing such order, are in conflict with the statute. They are, therefore, void.

B. The Act, as Construed and Applied by the Regulations and the Order, Calls for a Private Non-Federal Labor Draft for the Performance of Services that are Not Exceptional or Related to the National Defense, in Violation of the Thirteen Amendment to the United States Constitution.

The act, as construed and applied, calls for a labor draft for private or nonfederal purposes. This com-

plaint is entirely outside the field of unlimited authority of Congress to raise and maintain an army or provide for alternative service of a civilian nature. The defendant agrees that an examination of the law on this subject will reveal that the Thirteenth Amendment is no ban on the performance of military service. It also does not prohibit civilian work for the government or work for a federal agency, as in taking over industry by the Government, or work under control of the federal system.

All of the cases where the subject of the performance of civilian work ordered to be done by draft boards has been determined by the courts are not in point here; such do not control here. The cases have been considered under the Thirteenth Amendment as related to work done for the National Director of Selective Service in civilian public service camps—federal agencies. Such camps were not private camps but were federal. (See *United States v. Brooks,* 54 F. Supp. 995 (S. D. N. Y.), affirmed *Brooks v. United States,* 147 F. 2d 134 cert. denied 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188 (1st Cir.); *Zucher v. Osborne,* 54 F. Supp. 984 (D. C. W. D. N. Y.); *Hopper v. United States,* 142 F. 2d 181 (9th Cir.). None of these cases involved orders placing a conscientious objector in nonfederal employ or in the employ of private persons. It is seen that there exists here an obvious distinction between the orders under the present law and the work required under the 1940 Act. This is a real and substantial distinction. It is not one without a difference.

It must be admitted that there is no constitutional right of exemption from any kind of work that is within the discretion of Congress and the President to order a conscientious objector to perform. The appellant does not argue that a conscripted conscientious objector has a greater choice of work to perform than a person conscripted for ordinary military service. He does not. They are both on the same level. Neither may set his choice of service up against the discretion of the President acting under a proper law of Congress. The discretion and power of choice as vested in the President by the scope of the war power given to him through the act of Congress are unlimited. The objection here is that the order to do work for a nonfederal agency is not within the scope of the Universal Military Training and Service Act. If it is argued that it is, then it is the appellant's position that Congress does not have authority to conscript labor for a private employer or for a nonfederal project. In other words, the order in this case to perform civilian work is like a labor draft for private employers. It was not for the performance of service in the war effort of the nation.

The best way to emphasize this point to the court is to make an analogy. It will be conceded that men can be drafted to perform military service, notwithstanding the Thirteenth Amendment. But it seems that a very substantial and different question arises here. The Thirteenth Amendment prohibits the President from taking those men and putting them to work for private industry, even engaging in war work, which is not by

the Federal Government. It must be admitted that a soldier cannot be put to work by the Government in a private defense industry. It follows that conscientious objectors may not be ordered to do work for a private employer not engaged in federal work as an agency of the Government. If a soldier cannot be ordered to do private work for a private employer then a conscientious objector cannot be compelled to do such work. The question is as simple as that! It must not be mixed up with a maze of complex questions of war powers of the President.

There are no cases where the labor draft for private employment has been determined by the federal courts. No federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States v. Brooks,* 54 F. Supp. 995 (S. D. N. Y.), affirmed *Brooks v. United States,* 147 F. 2d Cir., cert.

denied 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188 (1st Cir.); *Hopper v. United States,* 142 F. 2d 181 (9th Cir.); *Zucher v. Osborne,* 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for a private labor for nonfederal agencies.

The civilian public service camps were operated at the expense of the Government. They were under the control of General Hershey and subject to the Selective Service Regulations promulgated by the President. It could not be successfully argued that the Thirteenth Amendment reached labor in such camps. It was alternate conscription service of a civilian nature performed for the Government. It is true that some of the camps were run by religious groups, but they were not privately owned and operated. They were federal camps. They were under federal control. There were elaborate regulations made and published by General Hershey, the Director of Selective Service. The religious camp directors of the different religious camps were acting as agents of General Hershey. They were, therefore, agents of the Government. The conscientious objectors in the camps were, therefore, working for the Government and not for private or nonfederal employers.

Let us turn now to a consideration of the leading cases on the Thirteenth Amendment to the Constitution. The draft law cases, although not in point, shall be considered first.

In the Selective Draft Law Cases (*Arver v. United States*), 245 U. S. 366, Chief Justice White (at page 390) held, without discussion, that compulsory military service did not violate the Thirteenth Amendment.

Angelus v. Sullivan, 246 F. 54 (Cir. Md.), held that the 1917 Act did not illegally interfere with the rights of the person contrary to the Thirteenth Amendment.

United States v. Brooks, 54 F. Supp. 995 (S. D. N. Y.), involved a question of whether the provisions of the Selective Training and Service Act requiring civilian work in a public service camp was invalid. The United States Court of Appeals for the Second Circuit sustained the holding of the lower court that the act was valid. (147 F. 2d 134.) The same holdings were made in *Weightman v. United States,* 142 F. 2d 188 (1st Cir.), and in *Heflin v. Sanford,* 142 F. 2d 798 (5th Cir.).

In *United States v. Brooks,* 54 F. Supp. 997 (S. D. N. Y.), the Thirteenth Amendment argument was based "on the treatment by the defendant of the provisions for work of national importance as completely severed and independent from the comprehensive mobilization contemplated by the Selective Training and Service Act." The court said that it must be treated as a part of the mobilization of all manpower. The argument of defendant was reduced to an absurdity. The court said the registrant contended he could be inducted into the army but could not be put in a camp in recognition of conscientious objectors . Defendant seemed to make the argument that the conscientious ob-

jector was singled out and discriminated against. The court said that the fact that the work was under civilian direction was immaterial because such work could be directed by either a civilian or the military. "Nor does it matter that the actual labor performed by the assignees is not directly in aid of the defense of the United States or of its military establishment. It is sufficient that in the judgment of Congress such labor is of national importance; that its performance by assignees releases others for services more directly concerned with military action; and that assignment of conscientious objectors tends to deter others from asserting a claim to exemption." Page 997.

The Second Circuit held in *Brooks v. United States,* 147 F. 2d 134, as follows:

> "The federal government in the exercise of its undoubted power to raise and maintain armed forces for the protection of the country could have disregarded the appellant's conscientious scruples against participating in such service and conscripted him for any military service which he was mentally and physically fit . . . Congress could in the exercise of its incidental power do whatever was reasonably necessary and appropriate to raise and maintain armed forces provided that those who were given exemption from such services be required to perform such work of national importance as they were able to perform under reasonable rules and regulations. There are many good reasons which may have led Congress so to provide but it is enough that such action may have been con-

sidered needed during a great national emergency for its effect upon the moral of those who do serve in the armed forces." Pages 134-135.

Weightman v. United States, 142 F. 2d 188 (1st Cir.), involved an attack against the constitutionality of the 1940 Act in its provisions for treatment of conscientious objectors. The power of the President to designate the forestry work and the low pay, described as slavery and imprisonment in the conscientious objector camps, were questioned. The court rejected all arguments. The court, among other things, said:

"Possibly the system established 'may be condemned by some as unwise or liberal or unfair' (Cardozo, J., concurring in *Hamilton v. Regents,* 293 U. S. 245, 266, 55 S. Ct. 197, 205, 79 L. Ed. 343), but this is no basis for holding the system unconstitutional. Since the situation presented by the Act called for 'the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.' *Kiyoshi Hirabayashi v. United States,* 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774. Under the circumstances we do not believe that the action taken with respect to conscientious objectors has exceeded constiutional bounds. In accord see *Hopper v. United States,* 9 Cir., 142 F. 2d 181; *United States v. Van Den Berg,* 7 Cir., 13 P. 2d 654, and cases cited." Page 192.

In *Hopper v. United States,* 142 F. 2d 181 (9th Cir.), the requirement for civilian work at a public service camp was attached. It was claimed to be involuntary servitude. The court said:

> "These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have been uniformly met with rejection." Page 186.

The defendant's claim that the work camp requirement violated the Thirteenth Amendment in *United States v. Van Den Berg,* 139 F. 2d 654 (7th Cir.), was rejected with the following statement:

> "Defendant's claims that his assignment to a conscientious objectors' camp amounted to imposition of involuntary servitude in violation of constitutional rights; . . . have all been considered fully by this court and denied in *United States v. Mroz,* 7th Cir., 136 F. 2d 221." Page 656.

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

Robertson v. Baldwin, 165 U. S. 275, 282-283, held that the federal statute authorizing justices of the

peace to issue warrants to arrest deserting seamen did not violate the federal Constitution, Thirteenth Amendment. This is also the old common law rule. The Supreme Court said:

> "It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview." (165 U. S., at page 282) Mr. Justice Harlan dissented. Much of what he says applies as argument in favor of the appellant here. See pages 288-303.

The compulsory road work law of Florida was held not to violate the Thirteenth Amendment because the services called for were exceptional and akin to the usual compulsory duties that every citizen owed the government. The work was likened to military service and jury duty, which are not forbidden by the Thirteenth Amendment. (*Butler v. Perry,* 240 U. S. 328, 333.) The Court said:

> "The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases,* 16 Wall. 36, 69, 71, 72; *Plessy v. Ferguson,* 163 U. S. 547, 542; *Robertson v. Baldwin,* 165 U. S. 275, 282; *Clyatt v. United States,* 197 U. S. 207; *Bailey v. Alabama,* 219 U. S. 219."

A case similar in its holding is *Plessy v. Ferguson,* 163 U. S. 537. That case involved a Louisiana law that provided for separate but equal accommodation for both black and white passengers traveling on railroads in the state. The Court held that the law did not violate any of the rights of a railroad employee convicted under the law. 163 U. S., at pages 542-543.

Mr. Justice Black in *United States v. Petrillo,* 332 U. S. 1, 13, stated that the criminal sanctions of the Communications Act punishing coercion in broadcasting did not violate the Thirteenth Amendment on its face. He indicated that the application of the statute may present the question. Thus it is a question whether it is void as construed and applied.

A New York Statute making it a crime for a landlord not to provide usual apartment house services on an equal basis to all tenants did not violate the Thirteenth Amendment. (See *Marcus Brown Holding Company, Inc. v. Feldman,* 256 U. S. 170, 199.) The Court said:

> "It is true that the traditions of our law are opposed to compelling a man to perform strictly

personal services against his will even when he has contracted to render them."

In *Auto Workers v. Wisconsin Employment Relations Board,* 336 U. S. 245, it was held that the law for collective bargaining between the employer and union did not violate the Thirteenth Amendment. The statute was sustained because it did not make it a crime to quit a job. 336 U. S., at page 251.

In all the cases quoted from above (except in the case of the seaman, which is special—finding its background of exemption from the rule in the common law) none of them involved service performed for a private person. They all involved forced service of an exceptional or emergency or special nature, to the state.

The peonage cases are directly in point here. They will not be considered in this section of the argument. But, before they are stated, let a few general remarks be made to show that they apply.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. The peonage cases would prohibit the drafting of young men as soldiers and putting them to work on the King Ranch in Texas or in the Broadway Department Store in Los Angeles. Soldiers could not be put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state hospital. The Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

Let us turn our attention now to a consideration of the peonage cases.

A very good discussion of the Thirteenth Amendment, its background and the earlier decisions under it appears in *Pollock v. Williams,* 322 U. S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of

obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage. (322 U. S., at page 8). The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd v. Hodge,* 334 U. S. 24, at pages 31-32.) Mr. Justice Jackson for the majority of the Court said:

> "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basis system of free labor. For example, forced labor has been sustained as a mean of punishing crime, and there are duties such as work on highways which society may compel." *Pollock v. Williams,* 322 U. S., at pages 17-18.

In the *Slaughter House* Cases, 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery. See 16 Wall., at pages 69, 71-72.

The other peonage cases, like *Pollock v. Williams,* 322 U. S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an

exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to war law. It is fundamental that the Constitution deals with realities and not with shadows. (*Cummins v. Missouri,* 4 Wall. 277, 325; *Ex parte Milligan,* 4 Wall., 2, 120-121.) And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Baily v. Alabama,* 219 U. S. 219, and *Taylor v. Georgia,* 315 U. S. 25) with *Pollock v. Williams,* 322 U. S. 4.

Hodges v. United States, 203 U. S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the court wrote on the subject of "involuntary servitude" words used the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to com-

mit that race to the care of the Nation. It is denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof." 203 U. S., at pages 16-17.

It is submitted, therefore, that the order for the appellant to perform work at Los Angeles County Department of Charities and the regulations authorizing such order constitute a construction and application of the statute which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

C. The Act, as Construed and Applied by the Regulation and Order, is Unconstitutional Because it Deprives the Defendant of Due Process of Law Contrary to the Fifth Amendment to the Constitution.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of American Jurisprudence on "Constitutional Law," requires " . . . that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained."

The Court's attention is called to the case of *Ex Parte Mitsuye Endo,* 323 U. S. 283. This case held *habeas corpus* proper to secure the release of a concededly loyal citizen who was being illegally detained

by the War Relocation Authority under presidential executive power. The Supreme Court, speaking through Justice Douglas, after calling attention to the constitutional safeguards against improper exercise of the war power, one of these being "due process" under the Fifth Amendment (See page 299), ruled that a concededly loyal citizen presents no problem of espionage or sabotage and since the power to detain is derived from the power to protect the war effort against espionage and sabotage, the detention, which had no relation to that objective, is unauthorized. The force of the reasoning in that case falls upon this case here before the Court.

It is to be noted that the Supreme Court of the United States as early as *Ex parte Milligan,* 4 Wall, 2, 120-121, has held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The *Milligan* case involved the release on *habeas corpus* of a civilian who had been sentenced to death upon a military trial during the Civil War in the state of Indiana, where federal court trial was available. Compare *Cummins v. Missouri,* 4 Wall. 277, at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless, the Supreme Court itself has recognized such presumption will be of no avail where a presidential war order is clearly shown to be arbitrary and repugnant to the Federal Constitution. See *Highland v. Russell Car & Plow Co.,* 279 U. S. 253, at pages 261 and 262.

A Selective Service case deemed worthy of mention on this question is *United States v. Emery,* (2d Cir. 1948) 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's leaving detached service "for which he had volunteered." He had previously been hired out as a voluntary laborer from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the Federal Government. Out of his wages he was paid the $15.00-a-month Civilian Public Service Camp allowance by the Federal Government. The balance of his wages was paid into a separate fund of the United States Treasury.

The appellant was not a volunteer. The *Emery Case* supra, is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments had not been violated. The court at 168 F. 2d 454, page 456, said:

> " . . . The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor."

The language was *dictum,* since the defendant was in no position to assert the defenses because he had volunteered for the work he later questioned. Had it been without his consent the case would have been different. Also, the points on forced labor were not presented in

that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as the appellant in this case did not consent to the work and since he was ordered to do work that is not in the "national" or "federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against his wish, it is plain that he has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

D. Section 462 (a) of the Act and Part 1660 of the Regulations, Insofar as They Have Been Construed and Applied to the Defendant Constitute an Unreasonable Abridgement of His Right of Freedom of Religion Contrary to the First Amendment to the United States Constitution.

Congress has seen fit to grant exemption to ministers and deferments to conscientious objectors. Both are recognitions of the relative importance of religion and conscience in our way of life; they are recognitions that the minister in the pursuit of his vocation contributes vitally to the nation's welfare and that the conscientious objector can also so contribute in a manner consistent with his scruples against participation in activity abhorrent to him or inconsistent with his religious commitments.

Assuming that the appellant presented satisfactory evidence that his vocation was the ministry, within the selective service definition, and that this evidence

stands unrebutted it would necessarily follow that the denial of a IV-D classification to him was arbitrary and illegal.

Dickinson vs. United States, 74 S. Ct. 152.

There is no question but that defendant presented satisfactory evidence that he was a conscientious objector. The selective service system became convinced that he was one and classified him in Class I-O.

This is important for the following reason: the sole and avowed basis of defendant's conscientious objection to participation in military activity is his dedication to his ministry. [Ex 16] He is not one of the 124 types of pacifist conscientious objectors; he is a conscientious objector solely because he faces "everlasting death" if he compromises with his dedication to his ministry. His answers on the SSS Form No. 100, on the SSS Form No. 150 and other documents in his file made clear he is not a pacifist. Since the law proscribes a philosophic basis and a purely personal moral code the only legal reason left for the board to give him a I-O classification was his ministry dedication.

Appellant's file presented considerable evidence that the ministry was his vocation and his court testimony (concerning what he tried to tell the board at his personal appearance before it) was definite and detailed that his dedication to this work called for all the time he could take away from the task of earning a living for his wife and himself.

We are not arguing here the basis-in-fact question; the amount of time, gross or proportionate, that he devoted to secular or to religious work is not in point here, even if it should actually be in point in a determination of the basis-in-fact problem.

We are here arguing that once it is found to be a fact that a registrant truly has dedicated his life to religious service (and this is implicit in the finding of the selective service system) his freedom of religion is abridged when he is compelled to remove himself from the area of his religious work to do secular work that prohibits him from following his calling. Put another way, and very briefly, a selective service registrant, such as this appellant, after a finding of fact such as we have here, must be free to "witness" his faith and to respond to the promptings of his call. In short, a governmental agency is constitutionally barred from interfering with the religious work of such a person; if Selective Service is legally qualified to determine the locale of the missionary activity and ministry of its registrants, absent a state of war, then the Department of Labor is equally qualified to tell the rest of us where to work in times of peace.

III.

APPELLANT WAS DENIED PROCEDURAL DUE PROCESS OF LAW IN THAT HIS LOCAL BOARD HEARING WAS UNFAIR AND IN THAT HIS CLASSIFICATION WAS NOT REOPENED WHEN IT SHOULD HAVE BEEN.

A. The Undisputed Evidence was that Appellant's Local Board Accorded Him Only Five Minutes for His Appearance Before Local Board, on December 10, 1951, Although he had Prepared Material for Presentation on His Minister's Classification Claim that He was Unable to Present Because of the Arbitrary and Unreasonable Shortness of the Time Allowed Him. [Ex. 26; R 35-.....]. In Fact, Only Three Minutes Were Available to Him. [R 51].

The ministry of Jehovah's witnesses is not well understood by local draft boards. To many persons it is incomprehensible that anyone, particularly a young person, will dedicate his life to an altruistic or religious enterprise of an "unorthodox" nature. The priesthood, the foreign-field missionary work and other more usual religious activities are quite well understood; however, the willingness of the door-to-door evangelist to endure the inevitable rebuffs (to mention but one of the obvious burdens of the work) is not comprehensible. Neither does the persistence and the occasional aggressiveness of some of the Jehovah witness missionaries make local board members sympathetic to the claims of

their Jehovah witness registrants. Although the board members are to serve in a judicial capacity they often do not bring a judicial attitude to their work; while prejudice is not claimed here indifference is. The board members knew the Appearance Before Local Board was appellant's only opportunity to meet them face to face; that he was entitled to discuss his file, to argue his evidence, to point out and to explain items in it that may have been stated in language having a unique meaning to the Jehovah's witness, and to give them new and further evidence. See §1624.2 of the Regulations. Confining the usual registrant to five minutes might be fair and reasonable; so confining one with the burden of establishing his right to a minister's classification, and, moreover, one of Jehovah's witnesses is almost on its face unfair. The definite and detailed courtroom testimony of appellant [R 36-42] concerning the items of his ministerial activity he had planned to present to the board (and unrebutted) demonstrates the unfairness of the five minutes limitation.

The explanation given in court [R 36-42], if heard by the local board, might have resulted in a different classification. This explanation, if included in the summary of the Appearance Before Local Board, might have resulted in a different Appeal Board classification. In any event, its absence from the summary, because of the arbitrary time limitation, was an unfair diminution of his appellate record. *Bejelis vs. United States,* (6th Cir., July 26, 1953) 206 F. 2d 354, 356; *Davis vs. United States,* (6th Cir., Nov. 12, 1952) 199

F. 2d 689, 691; *United States vs. Zieber,* (3d Cir., April 28, 1947) 161 F. 2d 90, 92; *United States vs. Stiles,* (3d Cir., 1948) 169 F. 2d 455, 457.

B. Nevertheless, it is the Attitude of Many Persons (and Doubtless of Many Local Board Members) that it is Not Enough for a Jehovah Witness Registrant to Be a Genuine Missionary or Evangelist, in Order to Be Entitled to a Minister's Status: It is Believed by Some He Must Also Occupy One of the Higher Echelons of the Sects' Hierarchy. Although the Regulations Do Not Impose Such a Higher Standard, This Appellant in Time Became Able to Meet It.

Therefore, when appellant presented new and further evidence that he was one of the "servants" of the congregation and, in fact, that he ranked next to the very top servant in his band of missionaries, his new evidence warranted formal reconsideration of his classification by his local board. Section 1625.2 so provides:

> "When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current defermentof the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classi-

fied, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Appellant's selective service file shows that he informed the board on October 22, 1953 that he had become Area Study Conductor [Ex 102-]; he later showed he had been entrusted with the responsibility of being Assistant Presiding Minister [Ex 133]. On neither occasion was his classification reopened. Even if he had been reclassified into the same class he would have had an administrative appellate opportunity. As the problem was handled by the board, he was precluded from having an appellate opportunity by the board's refusal to reopen. Such handling was condemned in *United States vs. Clark,* 105 F. Supp. 613, 164-615, in *United States vs. Crawford,* 119 F. Supp. 729, 730, and in *United States vs. Williams,* No. 8917 D. Conn., April 2, 1954. See Appendix A. This is also true of *In re Abramson,* 196 F. 2d 261 and the argument is supported by *Hull vs. Stalter,* 151 F. 2d 633.

CONCLUSION

Appellant has been denied due process of law and the judgment of conviction should be reversed.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.

Appendix

APPENDIX A

[Title of Court and Cause.]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
No. 8917 CRIMINAL

UNITED STATES OF AMERICA
vs.
ROBERT JAMES WILLIAMS

FINDING OF FACTS

MEMORANDUM OF OPINION

Defendant was indicted March 2, 1954 in one count for violation on April 20, 1953 of 50 App., USC 462(a) by wilfully and knowingly failing and refusing to submit to induction into the armed forces of the United States.

Defendant declined to be represented by counsel, pleaded not guilty, waived jury trial and was tried to the Court March 18 and 19, 1954. At the close of the trial defendant moved to dismiss the complaint, for a finding of not guilty and judgment of acquital.

There is no question but that defendant was classified 1-A, ordered to report for induction, reported, and deliberately refused to be inducted.

Defendant filed his classification questionnaire December 18, 1951, making no claim of either ministerial

exemption or conscientious objection classification, asking 4-A classification on the basis of a hip fracture almost six years previously. He was classified 1-A January 9, 1952 and classification card mailed January 11, 1952. On December 5, 1952 defendant was sent by mail an order to report January 16, 1953 for armed forces physical examination. December 8, 1952, defendant was notified by letter that the date for physical examination was changed to January 23, 1953.

On January 5, 1953 the board received a letter from defendant asking a change of classification to that of minister, accompanied by affidavits from four Jehovah's Witnesses in support thereof. The letter and affidavits purported to be dated and notarized on various dates from November 18, 1952 to January 5, 1953.

The Board on January 5, 1953 sent defendant a conscientious objector form 150, telling defendant to send it in and they would consider reopening his case, but to report as scheduled for physical examination. Defendant appeared, was examined, was accepted and a certificate of acceptability mailed to him.

He then wrote the Board a letter received February 6, 1953 stating that he was appealing the certificate of acceptability on the ground of his claim to ministerial exemption although conceding that he was physically and mentally fit for service.

At a date not established, defendant returned the form 150 claiming to be opposed to participation in war as a minister of Jehovah's Witnesses.

The board scheduled a hearing on March 4, 1953 on his request for reopening his classification.

The board wrote State headquarters, apparently asking advice on procedure, or the presence of Deputy Director Hennessey at the hearing. Hennessey was on vacation, but the board was advised to forward the cover sheet if it desired an opinion on procedure. It did not do so.

Defendant appeared at the hearing March 4 and testified that he claimed to be a minister as all Jehovah's Witnesses were ministers, that he worked 25 to 30 hours a week or 100 hours a month at his house to house and street ministry, while working 40 hours a week at General Electric, earning about $70 a week. He was then almost 20 years of age, and had been interested in Jehovah's Witnesses and their teachings only since about February 1952.

One of the board members, Minotti, explained several times during the hearing that a minister was a full time job. It would appear that he believed that any outside employment would disqualify a minister from exemption.

Defendant explained at the hearing his conscientious scruples against participation in war, but twice told the board that he was not claiming deferment as a conscientious objector, but exemption as a minister.

The board voted 6-0 not to reopen defendant's case and so notified defendant on March 5, 1953. The board had told defendant both at the beginning and end of the

hearing that he had no right to appeal if they did not reopen.

March 16, 1953 defendant was notified to report on April 20, 1953 for induction. Defendant reported on the date required but refused to take the oath.

No appeal lies from a certificate of acceptability. The sole question here relates to the board's procedure in handling the request to reopen the 1-A classification so as to eliminate any possibility of appeal from its action.

In this case the board might well have been justified, upon a consideration of reclassification on the same evidence presented at the time of its consideration of whether or not to reopen Williams' classification, to disbelieve his claims as to his vocation, and to deny him deferment as a minister. He is clearly incorrect in his claim that his ordination by baptism and the belief of the Witnesses that all those baptized are ministers bring him within the exemption of the Act. The restricted definition of minister in the Act was intended to exclude those who, like Williams, carried on full time secular work, engaged in preaching and distributing literature only part time, and might be found not primarily in charge of ministering to the spiritual needs of a flock.

It should be borne in mind that there is no constitutional prohibition against the drafting of ministers of the gospel, and that the exemption was placed in the Act principally to avoid depriving the members of religious

groups of those on whom they depended for religious leadership and guidance.

One of the board, to be sure, felt, and so informed Williams, that the Act only exempted those who were engaged in religious activity 24 hours a day to the exclusion of all secular work. This is erroneous. The question is, which is the vocation, the religious or the secular work? It is not established that the majority of the board had the same interpretation. Williams had the burden of convincing the board that his vocation was religious, and failed to do so.

It may be that the failure to reopen to give consideration to William's formal claim of conscientious objection in Form 150 was not erroneous, since he twice in his oral testimony after filing the form disclaimed any intention to ask deferment as a conscientious objector.

Were this an appeal from the board's decision in a hearing on reclassification after reopening on the facts before it, we should probably find that there is no error on the merits in the refusal to reopen.

There persists, nonetheless, a question as to whether the review on the facts provided by the Act and regulations within the Selective Service System was accorded to this registrant, and if not, whether the review denied him might have changed his classification. Had this case been reopened and considered by the appeal board on the evidence as to conscientious objection it is hard to see how the board could have refused a deferment

under the case of *Dickinson v. U. S.,* 346 U. S. 389, unless there was an affirmative finding that the evidence lacked credibility. Had the boards made a finding that Williams' late found interest in religion, arising after his 1-A classification, was a sham and a parroting of formulae designed only to avoid the service required under the Act, the courts on the record here might well be required to uphold the board in spite of the *Dickinson opinion.* Since there was no reopening and no chance for appeal provided, however, we have no way of knowing how the board or a hearing officer on appeal, and an appeal board, would have found on this point.

Procedurally, the prejudicial error on the part of the board was in the failure to reopen and reclassify under 32 C. F. R. 1625, even if in the same 1-A classification, or to classify or decline to reclassify under 32 C. F. R. 1624, so that appeal time would again be allowed. As indicated below, 1624 does not appear to be applicable under the facts of this case.

If the board found the application to reopen was on its face frivolous or sham, only meant to delay induction, the regulations do not force it to reopen. On the face of the regulations, it was required to reopen, however, if the request to reopen was accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification. 32 C. F. R. 1625.2.

A reading of 32 C. F. R. 1624 would appear to indicate that it is not applicable here, since far more than the 10 days after notice of classifaction had passed before the registrant asked for a hearing. The board apparently did not consider it a hearing under 32 C. F. R. 1624, for it advised the registrant that he had no right to appeal from a refusal to reopen. If the hearing had been one under 1624, such a right would, however, have been the registrant's under 1624.2(e). The board apparently considered its hearing and interview with the registrant as an informal questioning to keep itself currently informed under 1625.1(c). This, however, ignored the written evidence in the request to reopen, the four affidavits of ministerial status and the form 150, which, if true, would have required reclassification and, therefore, required consideration by the board and action thereon reopening and either classifying again as 1-A reclassifying in another classification if the board found that course justified, with a right to appeal within the Selective Service System.

Determination of the proper classification of this registrant is for the Selective Service Boards. His claim of change of status to that of a minister raised a question which required the local board to reopen and give formal consideration to his claim and the evidence submitted in behalf thereof, thereby preserving his right to a review by the appeal board.

Since the board failed to do this, the order to report for induction was based on an invalid classification, and

the defendant must be acquitted of the crime charged in this case.

The Court finds the defendant not guilty.

Dated at Hartford, Connecticut, this 2nd day of April, 1954.

J. JOSEPH SMITH
United States District Judge

(Underscoring supplied)

APPENDIX B

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

"Sec. 16. When used in this title— . . . (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites

and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."